

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

EDGAR L. SETTLEMIRE,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,  
Texas Department of Criminal Justice,  
Correctional Institutions Division,

Respondent.

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2:06-CV-0355

**REPORT AND RECOMMENDATION**  
**TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS**  
**FOR FAILURE TO EXHAUST STATE COURT REMEDIES**

Came for consideration the amended petition for a writ of habeas corpus filed by petitioner EDGAR L. SETTLEMIRE on January 3, 2007.<sup>1</sup> For the reasons hereinafter set forth, it is the opinion of the undersigned United States Magistrate Judge that the petition should be DISMISSED for failure to exhaust state court remedies.

I.  
**PROCEDURAL HISTORY**

In his petition, petitioner avers he was convicted, on May 19, 1998, of the felony offense of aggravated sexual assault of a child in Brazoria County, Texas, and received a fifteen (15) year

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<sup>1</sup>Petitioner originally submitted his habeas petition with the United States District Court for the Southern District of Texas, Galveston Division on November 28, 2006. On December 4, 2006 the Galveston Court entered an Order interpreting the petition as actually seeking relief pursuant to 28 U.S.C. §2241 and transferring the case to this Court. The habeas petition, however, was incomplete. On December 21, 2006, petitioner was ordered to submit a complete form petition. On January 3, 2007 petitioner submitted the Amended Petition however, petitioner has omitted from the form petition pages 6, 7, and 8 thus the form is still incomplete.

prison sentence for such offense. Petitioner is currently incarcerated in the Clements Unit in Potter County, Texas.

Petitioner has represented to this Court that he did not directly appeal his conviction and sentence. Petitioner further states that he filed a state writ of habeas corpus with the Texas Court of Criminal Appeals on October 11, 2006, cited as WR-65,665-02, and that the Court of Criminal Appeals rendered its decision the same date. A review of the docket in petitioner's state habeas case, however, shows such case to have been received by the Texas Court of Criminal Appeals on October 25, 2006, but also shows such case is currently pending in that court.

## II. PETITIONER'S ALLEGATIONS

As stated *supra*, petitioner failed to submit, in his amended petition, certain pages which should have contained the grounds he presents to this Court for review. However, petitioner represents his challenge in the state habeas case to be:

“The State of Texas applies (sic) the law of C.C.P. Article 37.07 §4(a) par 1, par 2, par 3 arbitrarily (sic). Paragraph (sic) 2 is never apply (sic) according to a Court of Law.”

This Court assumes petitioner is attempting to challenge the same issue herein.

## III. EXHAUSTION OF STATE COURT REMEDIES

Section 28 U.S.C. § 2254 states, as relevant to this proceeding:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B)(I) there is an absence of available State corrective process; or

- (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) . . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254. The exhaustion doctrine set forth in section 2254 requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights in state cases. *Castille v. Peoples*, 489 U.S. 346, 349, 109 S.Ct. 1056, 1059 (1989). The doctrine serves “to protect the state courts’ role in the enforcement of federal law and prevent disruption of state judicial proceedings.” *Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982).

Under our federal system, the federal and state courts are equally bound to guard and protect rights secured by the Constitution. Because it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, federal courts apply the doctrine of comity, which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.

*Id.* (brackets, internal quotation marks, and citations omitted). To have exhausted his state remedies, a habeas petitioner must have *fairly presented* the *substance* of his federal constitutional claims to the state courts. *Nobles v. Johnson*, 127 F.3d 409, 420 (5<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1139, 118 S.Ct. 1845, 140 L.Ed.2d 1094 (1998). This requires that any federal constitutional claim presented to the state courts be supported by the same factual allegations and legal theories

upon which the petitioner bases his federal claims. *Picard v. Connor*, 404 U.S. 270, 276, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). Further, in order to satisfy the federal exhaustion requirement, petitioner must fairly present to the **highest** state court **each** constitutional claim he wishes to assert in his federal habeas petition. *Skelton v. Whitley*, 950 F.2d 1037, 1041 (5<sup>th</sup> Cir.), *cert. denied sub nom. Skelton v. Smith*, 506 U.S. 833, 113 S.Ct. 102, 121 L.Ed.2d 61 (1992); *Richardson v. Procnier*, 762 F.2d 429, 431 (5<sup>th</sup> Cir. 1985); *Carter v. Estelle*, 677 F.2d 427, 443 (5<sup>th</sup> Cir. 1982), *cert. denied*, 460 U.S. 1056, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983). In the state of Texas, the Court of Criminal Appeals in Austin, Texas is the highest court which has jurisdiction to review a petitioner's confinement. Tex. Code Crim. Proc. Ann. art. 44.45 (Vernon 1999). Claims may be presented to that court through an application for a writ of habeas corpus, *see* Tex. Code Crim. Proc. Ann. art. 11.01 et seq. (Vernon 2005), or on direct appeal by a petition for discretionary review.

In his habeas application petitioner represents he filed, on October 11, 2006, a state habeas petition. As discussed above, a review of the Texas Court of Criminal Appeals docket shows such state habeas petition to currently be pending. Therefore, the state's highest court has not had an opportunity to review and determine the merits of petitioner's claim. Consequently, petitioner has not shown the claim presented herein, presuming it is the same claim presented to the state court, has been exhausted. Accordingly, petitioner's ground has not been exhausted and his federal habeas petition is subject to summary dismissal in order that petitioner may present to, and obtain a ruling by, the Texas Court of Criminal Appeals on his ground.

#### IV. RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States

District Judge that the Petition for Writ of Habeas Corpus filed by petitioner EDGAR L. SETTLEMIRE be, in all things, DISMISSED for failure to exhaust state court remedies.

V.  
INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Report and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 5th day of January 2007.

  
CLINTON E. AVERITTE  
UNITED STATES MAGISTRATE JUDGE

**\* NOTICE OF RIGHT TO OBJECT \***

Any party may object to these proposed findings, conclusions and recommendation. In the event a party wishes to object, they are hereby NOTIFIED that the deadline for filing objections is eleven (11) days from the date of filing as indicated by the “entered” date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(B), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(D). When service is made by mail or electronic means, three (3) days are added after the prescribed period. Fed. R. Civ. P. 6(e). Therefore, any objections must be filed on or before the fourteenth (14<sup>th</sup>) day after this recommendation is filed as indicated by the “entered” date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); R. 4(a)(1) of Miscellaneous Order No. 6, as authorized by Local Rule 3.1, Local Rules of the United States District Courts for the Northern District of Texas.

Any such objections shall be made in a written pleading entitled “Objections to the Report and Recommendation.” Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party’s failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass’n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).